87-813

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES BRANDT and HENRY BRANDT,
d/b/a BRANDT CONSTRUCTION CO., a partnership,
Petitioner,

vs.

UPTOWN NATIONAL BANK OF MOLINE,
a national banking corporation,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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59pp

QUESTIONS PRESENTED

Whether the decision of the Seventh Circuit Court of Appeals (Seventh Circuit) decided important questions of federal law pertaining to jurisdiction and the relationship of substance to form in a way which directly conflicts with prior decisions of this Court, decisions of other federal courts of appeal and its own prior decisions in one or more of the following respects:

A. Ignored substantial precedent which establishes the doctrine of ancillary jurisdiction as a viable and useful federal doctrine by failing to recognize plaintiff's specific invocation of ancillary jurisdiction so as to obtain federal court resolution of matter intimately related to a pending Miller Act proceeding.

B. Refused to follow the direction of this Court that when propriety of removal is not challenged, it is no longer a question of whether the removal was proper but instead becomes whether the court would have had jurisdiction—original, ancillary or pendent.

C. Contravened both basic policy of the federal judicial system to make determinations based on substance rather than on form and a continuing trend toward utilization of the doctrines of ancillary jurisdiction and waivable error:

1. By elevating the form of the plaintiff's initial pleading over its substance, thereby depriving the parties a resolution of their ancillary dispute after five years of costly litigation and two federal jury trials.

2. By encouraging the raising of federal jurisdictional defenses at the appellate level rather than at the outset.

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No.

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CHARLES BRANDT and HENRY BRANDT,
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Petitioner,

vs.

UPTOWN NATIONAL BANK OF MOLINE,
a national banking corporation,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles Brandt and Henry Brandt, d/b/a, Brandt Construction Company respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 11, 1987.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit rendered on August 11, 1987 is reported at 826 F.2d 643 and is reprinted at A-1.

The Opinion of the United States District Court for the Central District of Illinois rendered on October 23, 1984 is reported at 595 F. Supp. 1117 and is reprinted at A-10.

The unpublished Docket Order of the United States District Court for the Central District of Illinois rendered on November 2, 1983 is reprinted at A-16.

The unpublished Judgment Order of the United States District Court for the Central District of Illinois rendered on September 10, 1985 is reprinted at A-16.

The unpublished Opinion and Order of the United States District Court for the Central District of Illinois rendered on September 24, 1985 is reprinted at A-18.

The unpublished Opinion and Order of the United States District Court for the Central District of Illinois rendered on November 26, 1985 is reprinted at A-19.

The unpublished Judgment Order of the United States District Court for the Central District of Illinois rendered on April 29, 1986 is reprinted at A-21.

The unpublished Opinion and Order of the United States District Court for the Central District of Illinois rendered on June 2, 1986 is reprinted at A-22.

SUPREME COURT JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on August 11, 1987. This Petition for Writ of Certiorari has been timely filed within 90 days thereafter (28 U.S.C. 2101(c); Supreme Court Rules 20.2, 20.4).

The statutory provisions which confer jurisdiction upon this court are U.S. Sup. Ct. Rule 17.1(a), 28 U.S.C. and U.S. Sup. Ct. Rule 17.1(c), 28 U.S.C. The decision of the Seventh Circuit Court of Appeals conflicts with previous decisions of the United States Supreme Court, other Circuit Courts of Appeal and its prior decisions. The Seventh Circuit has ruled upon jurisdictional questions which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

40 U.S.C., Secs. 270(a) and 270(b)

28 U.S.C., Sec. 1441

Fed. R. Civ. P. 42

Fed. R. Civ. P. 14

Fed. R. Civ. P. 61

Pursuant to U.S. Sup. Ct. Rule 21 (f), 28 U.S.C. the pertinent text of these provisions shall be set forth in the appendix attached to this petition.

STATEMENT OF THE CASE

Background in the District Court

Owens-Corning Fiberglas Corporation (Owens-Corning) filed a Miller Act claim pursuant to 40 U.S.C. Secs. 270a and 270b against Brandt Construction Company (Brandt) for payment of an indebtedness on a construction project on the Rock Island

Arsenal, a federal facility, in the United States District Court for the Central District of Illinois.* At the time suit was filed jurisdiction over Owens-Corning's Miller Act claim rested exclusively within the federal court.

Brandt then filed suit against Uptown National Bank of Moline (Uptown) in state court. This was, in substance, a third-party action seeking indemnity or reimbursement of any amount which Brandt might have to pay to Owens-Corning in the pending federal action. In addition, punitive damages were sought. Brandt's indemnity claim was based on Uptown's misapplication of funds due a subcontractor which Brandt had entrusted to the bank.

Uptown petitioned for removal of Brandt's state court suit to the district court for the Central District of Illinois on the erroneous assumption that Brandt's complaint stated a Miller Act cause of action.

Brandt, deciding not to accept removal as conclusive of its right to have its claims against Uptown placed before the federal court, filed a Motion To Invoke Ancillary Jurisdiction And To Consolidate and a Memorandum of law in support of said motion. This was to resolve further concerns surrounding the basis for the district court's jurisdiction over Brandt's state law claims. The federal court was the only forum where Brandt could obtain a joint trial of all facets of the Owens-Corning /Brandt/Uptown dispute.

Uptown filed a Motion to Dismiss Brandt's complaint alleging that Counts I and II of the complaint did not state a Miller Act cause of action. Brandt filed a Memorandum in Resistance

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* The full caption of the suit filed by Owens-Corning is as follows: THE UNITED STATES OF AMERICA for the Use of OWENS-CORNING FIBERGLAS CORPORATION, a corporation, Plaintiff, v. BRANDT CONSTRUCTION COMPANY, a partnership comprised of Charles Brandt and Henry Brandt; CHARLES BRANDT, a partner of Brandt Construction Company; HENRY BRANDT, a partner of Brandt Construction Company; and INSURANCE COMPANY OF NORTH AMERICA, Defendants.

to the defendant's motion on October 10, 1983 which specifically referred to its pending Motion to Invoke Ancillary Jurisdiction and to Consolidate and pointed out that its complaint was not brought under the Miller Act but was a derivative action. Brandt argued: "In fact, such an action is a related, but separate proceeding, involving different parties and issues. If the court grants the pending Motion to Invoke Ancillary Jurisdiction and to Consolidate such issues can be resolved in this proceeding and many of the points raised and the defendant's motion obviated."[1]

The Court allowed Brandt's motion and thus jurisdiciton in the district court was conferred by Rule 14(a), which allows third-party indemnity actions without an independent showing of subject matter jurisdiction. A trial ensued and a verdict was entered against Uptown National Bank for compensatory and punitive damages in the amounts of $59,883.00 and $158,000.00 respectively. The compensatory award was later amended to $64,249.46 by agreement.

Following a remittitur by the district court judge of the punitive award against Uptown National Bank, a second jury trial was conducted on the issue of punitive damages. The jury returned a verdict in favor of Brandt in the amount of $125,000.00 and the district court entered judgment on the verdict. There was no challenge to the jurisdiction of the district court by either party.

Uptown appealed the second judgment and the United States Courts of Appeals for the Seventh Circuit raised the jurisdictional question *sua sponte* during oral argument. Supplemental briefs were submitted by both parties concerning this jurisdictional issue. This was the first time Uptown took the position that there was no federal jurisdiction. A decision remanding the case to the district court with directions to remand the case to state court was entered on August 11, 1987.

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[1] Brandt's Memorandum in Resistance to defendant's Motion to Dismiss and/or Strike is included on Appendix page A-24.

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit Refused To Recognize Brandt's Motion To Invoke Ancillary Jurisdiction And To Consolidate As An Independent Basis Of Jurisdiction Exclusive Of Defendant's Removal. Such A Decision Ignores Holdings Of This Court And Other Federal Courts Of Appeals And Creates Confusion In An Important Area Of Federal Law.

In reaching its decision to reverse on the basis of lack of jurisdiction and directing that this litigation be removed to state court, the Seventh Circuit has created confusion concerning the important federal doctrine of ancillary jurisdiction. Its decision is inconsistent with prior decisions of this Court and other federal courts of appeal.

The Seventh Circuit justified its reversal of the District Court's judgment, entered after two trials and five years of litigation, under the guise that Brandt's state law counts were improperly removed. It refused to recognize Brandt's Motion to Invoke Ancillary Jurisdiction and to Consolidate as an independent basis for jurisdiction. Instead the court focused only on consolidation by stating:

> "But Rule 42(a) requires that both actions be 'pending before the court' and an improperly removed action does not meet this criterion."

United States for use of Owens-Corning Fiberglass Corporation v. Brandt Construction Co., 826 F.2d 643, 647 (7th Cir. 1987).

In taking this action, the Seventh Circuit ignored the reality of what occurred when Brandt successfully invoked the federal court's ancillary jurisdiction via a procedure wholly separate from Uptown's removal petition. Plaintiff's Motion to Invoke Ancillary Jurisdiction And To Consolidate was designed to eliminate any jurisdictional questions raised by Uptown's

removal to federal court.[2] The district court's allowance of the motion should be regarded as separate and independent from the removal in providing a basis for federal jurisdiction. It was Brandt's motion, not defendant's removal, which was the obvious jurisdictional basis for the third-party action against Uptown in federal court. It was not even necessary for the court to grant the motion since ancillary jurisdiction exists if it is apparent from the record.[3] For example, it has been noted that the question of the court's power is ordinarily resolved on the face of the pleadings. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 1139 (1966).

The doctrine of ancillary jurisdiction is a salutory and well-recognized one which avoids the burden and expense of piecemeal litigation. This Court has stated:

> "Moreover, the exercise of federal jurisdiction over claims against parties as to whom there existes no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(h), and in the context of third-party claims under Fed. Rule Civ. Proc. 14(a). (Citing cases.)

Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 1798 (1973). See also, *Cincinnati, I. & W.R. Co. v. Indianapolis Union Ry.Co. et al.,* 270 U.S. 107, 46 S.Ct. 221, 223-224 (1926)

Rieser v. District of Columbia, 580 F.2d 647 (D.C. Cir. 1978), involved similar facts as in the present action. Rieser filed a state

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[2] Appendix pages A-28-31 contains a reproduction of the Motion to Invoke Ancillary Jurisdiction and the Memorandum supporting the motion.

[3] The docket entry allowing the motion is included in Appendix page A-16.

law complaint in federal court and moved to have the complaint consolidated with a properly filed federal action. The Court of Appeals recognized that the district court's consolidation of Rieser's state law action pursuant to Rule 42 (Fed. Rules Civ. Proc. Rule 42(a)), although technically improper, amounted to a third party complaint of the kind permitted by Rule 14 (Fed. Rules Civ. Proc. Rule 14(a), 28 U.S.C.). The court emphasized that a party must not be penalized for mislabeling a motion to consolidate when plaintiff could have originally filed its third party complaint in a pending federal action. The court noted:

> "Although freighted with dangerous tactical implications, we are convinced that Rieser's August 31 pleading against the District, at least as perfected by the trial court's October 11 consolidation order under Fed.R.Civ.P. 42(a), amounted to a third-party complaint by the original plaintiff against the third-party defendant of the kind authorized by the third-party practice provisions in Fed.R.Civ.P. 14(a). . . . Thus, plaintiff's independent complaint *cum* Rule 42(a) consolidation motion circumvented no procedural requirement under Rule 14(a), and in fact fully accomplished the latter provision's design of securing joint trial of all of 'plaintiff's claim(s) . . . arising out of the transaction or occurrence that (are) the subject matter of the plaintiff's claim against the [original defendant, *i.e.*, CBI Fairmac].' In light of the healthy spirit of practicality animating the Federal Rules see e.g., Fed.R.Civ.P. 1, we see no need in this case to penalize a litigant for mislabeling a motion. See Fed.R.Civ.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties')."

Rieser v. District of Columbia, 580 F.2d at 654-655.

In the case at bar, after Uptown's removal of Brandt's state court action to federal court, Brandt filed its Motion to Invoke

Ancillary Jurisdiction And To Consolidate its state law indemnity claim with the related Owens-Corning Miller Act suit. Indisputably, Brandt could have dismissed its state law claim and filed its ancillary third party claim for indemnity in federal court pursuant to Rule 14 (Fed. Rules Civ. Proc. 14, 28 U.S.C.). Under the rationale of *Rieser,* Brandt should not be penalized simply because it chose to label this a "consolidation" rather than a "third party" claim.[4]

The same pragmatic and sensible approach to the disposition of disputes without undue fragmentation is manifested in a number of cases, including *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207 (1970) and *Mayor of Philadelphia v. Education Equality League,* 415 U.S. 605, 94 S.Ct. 1323, 1336-1337 (1974). In *Rosado* this Court specifically held that a federal district court had discretion to retain jurisdiction over pendent state claims once the primary federal question was resolved. There is no logical reason to impose a different rule for state law claims with ancillary jurisdiction in the federal court. Thus, once the district court found ancillary jurisdiction existed over plaintiff's claim against Uptown National Bank, it was within the judge's discretion to retain that jurisdiction. Until the Seventh Circuit's *sua sponte* jurisdictional challenge at oral argument, that ancillary jurisdiction remained unchallenged for five years.

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[4] *Brown v. Wright,* 588 F.2d 708 (9th Cir. 1978), ineptly drafted Motion for Reconsideration would be treated as a motion for new trial. "In fact, it is the motion's substance, and not merely its linguistic form, that determines its nature and legal effect." (2A Moore's Federal Practice Sec. 7.05)

II

The Seventh Circuit's Reversal Of The District Court In This Case Ignores Controlling Precedents Of The Supreme Court And Federal Courts Of Appeal Which Recognize The Doctrine Of Ancillary Jurisdiction—Even In Situations Where The Initial Removal To Federal Court From State Court Was Technically Improper.

It is undisputed that the propriety of the defendant's removal of Brandt's state court claim was not challenged in the district court. As such, the Seventh Circuit erred in making its decision based on the impropriety of the removal and in doing so ignored the direction in this area given by this Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344 (1972).

Grubbs makes it clear that when propriety of removal is not challenged, it is no longer a question of whether the removal was proper but instead becomes one of whether the court would have had original jurisdiction. In that case, the Court of Appeals had found the removal to be improper but this Court reversed stating:

> "Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of that case had it been filed in that court. In *Baggs v. Martin*, 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155 (1900), a receiver appointed by a federal court was sued in state court and removed that action to the federal court that appointed him. Following judgment on the merits, the receiver sought reversal of the judgment on the ground that the case was not properly removable from the state court. Since the federal court that had earlier appointed

> the receiver would have had original jurisdiction of an action against him, this Court held that he could not then object to the removal of the case when removal had come as a result of his own action."

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 92 S.Ct. 1347, 1348, 31 L.Ed, 2d 612 (1972). See also, *Beems v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983).

Grubbs and other Supreme Court decisions establish the doctrine of waivable error. It has been explained as follows:

> "It has been held that where the state court lacks subject matter jurisdiction and the case is removed, the defect cannot be waived although the federal court would have had original jurisdiction if the suit had been brought there initially. With deference, we believe that these cases are unsound in the light of the Supreme Court decisions previously discussed. Moreover, the derivative requirement does not foster practical judicial administration. The fundamental principles concerning removal and lack of subject matter jurisdiction can be summarized as follows: (1) where the case is actually either within the scope of original jurisdiction or within a broader grant of jurisdiction, if any, conferred by a removal statute, all matters concerning the removal of the case to the federal court are capable of waiver; (2) where the removed suit is outside both the grant of jurisdiction and a broader grant of jurisdiction, if any, conferred by a removal statute, the case must be remanded for lack of federal jurisdiction, unless by steps properly taken jurisdiction is perfected."

Moore's Federal Practice, Vol. 1A, Part 1, 0. 157 (11.-4), p. 175 (1985 Ed.).

In 1985 the Seventh Circuit applied the *Grubbs* doctrine in finding that ancillary jurisdiction is sufficient to satisfy the test

of whether there would have been original jurisdiction in the federal court and that jurisdiction thus exists over a case that has proceeded to judgment. *Van Tine v. Elkhart Brass Mfg. Co., Inc.*, 762 F.2d 511 (7th Cir. 1985).

In *Van Tine*, the court held that the "original jurisdiction" requirement would be satisfied if a pendent state law claim, arising out of a common nucleus of fact as the federal claim, were to be tried without objection in the federal court. In that case Wausau Insurance Company, (a defendant in state court) failed to join a co-defendant's removal petition but proceeded to successfully defend the action in federal court as if plaintiff's state law action had been properly removed. The Seventh Circuit adopted a practical resolution to the alleged jurisdictional problem created by Wausau's failure to join the removal petition of Elkhart Brass by stating:

> The rule is that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972). In the present case, the record reveals that the Van Tines participated in all the proceedings in the district court, including extensive discovery against each defendant, Elkhart Brass and Wausau, without protest and waited nearly four months after the district court entered summary judgment in favor of each defendant to file their Motion to Remand for lack of subject matter jurisdiction over Wausau. Because the plaintiffs failed to object to Wausau's failure to join the removal petition until after extensive discovery had been completed and then some four months after the entry of final judgment in Federal Court, the question is whether the district court could have exercised original jurisdiction over Wausau. *Grubbs*, 405 U.S. at 702, 92 S.Ct. at 1347....

> The constitutional prong requires a federal claim of "sufficient substance to confer subject matter jurisdiction on the court" and that both the federal and state claims arise from a "common nucleus of operative fact...[such that the plaintiff] would ordinarily be expected to try [his claims]...in one judicial proceeding...." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).
>
> Turning to the statutory prong, examination of 29 U.S.C. Sec. 185 reveals no evidence of Congressional intent that pendent claims not be brought in federal court when jurisdiction is based on this section; rather, pendent claims are commonly brought under this basis of jurisdiction. (Citing cases). Since both the constitutional and statutory requirements for pendent party jurisdiction were satisfied in this case, we hold that the district court properly exercised pendent party jurisdiction over the claim against Wausau.

Van Tine v. Elkhart Brass Manufacturing Company, 762 F.2d 511 at 518, 519 (7th Cir. 1985)

Technically, removal of Van Tine's state law claim against Wausau was improper because Wausau failed to join in the removal petition. However, the court correctly interpreted *Grubbs* as establishing jurisdiction over plaintiff's action against Wausau because this action was pendent to the properly removed federal claim of the plaintiff against Elkhart Brass. *Van Tine* illustrates that pendent and ancillary state law claims are included within the scope of the *Grubbs* holding.

The Seventh Circuit never explained why it ignored both this Court and its own precedent in reaching its decision in the instant case.

III

Since Brandt Could Have Filed A Third Party Complaint Against Uptown, The Seventh Circuit's Refusal To Recognize The Ancillary Jurisdiction Of The Federal Court Elevates Form Over Substance. This Is Contrary To Basic Federal Philosophy, Deprives The Parties A Resolution Of Their Dispute After Five Years Of Costly Litigation, And Encourages Belated Jurisdictional Challenges.

There is no question but that the Brandt/Uptown dispute arises out of the same series of transactions as provided the basis for the Miller Act suit filed by Owens-Corning against Brandt. In fact, Brandt was seeking reimbursement of amounts recovered against it by Owens-Corning plus punitive damages. As previously discussed, there could be no jurisdictional challenge had Brandt resisted Uptown's removal petition, dismissed its lawsuit in state court, and then filed a third party action pursuant to Rule 14(a).

By dwelling on the improriety of the removal and considering Brandt's invocation of the district court's ancillary jurisdiction only in the removal context as opposed to as an independent concept, the Seventh Circuit has voided five years of litigation, including two jury trials, based on a supposed technical jurisdictional deficiency in the pleadings. This is contrary to a long-established and often recognized principle of federal law: substance controls over form. *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 299, 85 S.Ct. 1517, 1521 (1965); *State of Arkansas v. State of Texas*, 346 U.S. 368, 74 S.Ct. 109, 111 (1953).

Just as the court in *Rieser v. District of Columbia*, 580 F.2d 647 (D.C. Cir. 1978), cited above, held that a party should not be penalized for mislabeling a motion, Brandt should not be penalized for electing to seek indemnity via pleadings labeled a state court complaint and a federal motion to invoke ancillary jurisdiction as opposed to one labeled third party complaint. Since Brandt's indemnity claim was clearly ancillary to the

Miller Act claim of Owens-Corning, it could have been brought in federal court as a third party action. No independent basis for federal jurisdiction was required. *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959).

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 92 S.Ct. 1347 (1972), stands for the proposition that this court will not recognize modal or precedural defects raised after trial to oust the federal court of jurisdiction. Yet the decision of the Seventh Circuit ignores this direction and encourages parties who lose at the trial level to look for jurisdictional arguments in an effort to avoid an adverse result.

CONCLUSION

For the reasons stated, Brandt prays that this Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States of America, for the Use of
Owens-Corning Fiberglass Corporation,
Petitioner,

v.

Brandt Construction Company, a partnership, et al.,
Defendants.

Charles Brandt and Henry Brandt d/b/a Brandt
Construction Company, a partnership,
Plaintiffs-Appellees, Cross-Appellants,

v.

Uptown National Bank of Moline, a national
banking corporation,
Defendant-Appellant, Cross-Appellee.

Nos. 86-1993, 86-2078.

United States Court of Appeals,
Seventh Circuit.

Argued April 16, 1987.

Decided Aug. 11, 1987.

General contractor whose final payment to subcontractor was diverted by assignee bank to satisfy unrelated indebtedness of subcontractor rather than used to pay subcontractor's supplier brought action against bank to recover amount it paid on its payment bond to satisfy supplier's claim. The United States District Court for the Central District of Illinois, 595 F.Supp. 1117, Michael M. Mihm, J., granted bank's motion for summary judgment, and contractor appealed. The Court of Appeals, Will, Senior District Judge, sitting by designation, held that: (1) removal of contractor's state law claim against bank for breach of fiduciary duty was improper due to lack of federal question, and (2) District Court did not acquire ancillary

jurisdiction over improperly removed case by consolidating it with related and properly filed case.

Vacated and remanded.

G. Trent Marquis, Thomas a. Skorepa, Klockau, McCarthy & Ellisom & Marquis, Rock Island, Ill., for defendant-appellant.

Robert J. Noe, Bozeman, Neighbour, Patton & Noe, Moline, Ill., for plaintiffs-appellees.

Before WOOD and EASTERBROOK, Circuit Judges, and WILL, Senior District Judge.*

WILL, Senior District Judge.

This is an appeal from a judgment in favor of plaintiffs-appellees ("Brandt") entered after a jury trial—in fact *two* jury trials—in district court. At oral argument, this court raised the question whether the district court had acquired jurisdiction upon removal from state court. Both sides filed supplemental briefs, Brandt contending that the district court had jurisdiction and defendant-appellant Uptown National Bank ("Uptown") maintaining that it did not. Because we find that the district court lacked jurisdiction, we vacate the judgment and remand to the district court with instructions to remand to the state court.

I.

The background of the case is as follows: Brandt was awarded two construction contracts from the federal government, necessitating the posting of performance and payment bonds under the Miller Act, 40 U.S.C. §§ 270a-270d (1982). Brandt subcontracted with DeVolder Roofing Company for the roofing

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

phase of the project. DeVolder, short of funds, turned to Uptown for financing. DeVolder had previously obtained financing from Uptown on other jobs and had outstanding debts owing to Uptown.

Uptown agreed to open up a line of credit for DeVolder's use on the project. After a meeting between representatives of Brandt, DeVolder, and Uptown, Brandt agreed to have its checks to DeVolder also name Uptown as a payee. At trial, Charles Brandt testified that Uptown promised to ensure that all of DeVolder's bills, including those of suppliers, were paid.

Throughout most of the construction period, everything went according to plan. Then, in October 1982, Brandt made its final payment to DeVolder by a check for $64,734 payable jointly to DeVolder and Uptown. Brandt was unaware that some of DeVolder's suppliers, including Owens-Corning Fiberglass Corporation, remained unpaid. DeVolder asked Uptown not to apply the check from Brandt to DeVolder's preexisting debt, but to the claims of suppliers. Uptown refused; as a result, DeVolder fell short of funds to pay Owens-Corning. DeVolder subsequently went bankrupt.

Owens-Corning filed a Miller Act claim against Brandt and Brandt's surety in federal court. Brandt sued Uptown in state court; Uptown removed the case to federal court where it was consolidated with the previously filed Owens-Corning case. In the Owens-Corning case, apparently without substantial opposition, the district court found Brandt liable under the bond for $59,883. That judgment has not been appealed. In the removed case, *Brandt v. Uptown*, Uptown moved for summary judgment on both counts of Brandt's complaint. The district court, apparently construing count I as a Miller Act claim,[1] found that

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[1] Judge Mihm's opinion is somewhat unclear on this question. Though at one point he states that count I was "brought pursuant to the Miller Act, 40 U.S.C. § 270a et seq.," at another he observes that "that is not a Miller Act proceeding. 595 F.Supp. 1117, 1118." (C.D.Ill.1984).

Brandt had failed to state a cause of action and granted the motion in part. As to count II, charging a breach of fiduciary duty under state law, the district court denied the motion and the case proceeded to trial on that claim.

In the first trial, the jury awarded Brandt $59,000 in actual damages and $158,000 in punitive damages. The district court ordered a remittitur of the punitives to $25,000, which Brandt rejected, necessitating a new trial limited to the subject of punitive damages. After the second trial, the jury awarded $125,000 in punitive damages, and the district court denied all post-trial motions. Uptown appealed and Brandt cross-appealed from the entry of summary judgment on count I.

II.

Though the parties raise numerous issues concerning the conduct of the trials below, we begin—and end—with the jurisdictional question: Was this case properly removed to federal court, and if not, can Brandt preserve its judgment under any theory?

In general, a case may be removed from state to federal court only if it could have been filed in the federal court originally. 28 U.S.C. § 1441(a), (b). For a case to be removable, therefore, the basic elements of federal subject matter jurisdiction—diversity or a federal question—must be present. Here, the state court case, *Brandt v. Uptown,* was solely between Illinois citizens,[2] leaving the pendency of a federal question as the only possible basis for removal. The district court treated count I of Brandt's complaint as a claim under the Miller Act, which if correct would seem to provide the requisite federal question. (Under this view, count II would be a pendent claim also within

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[2] Uptown is an Illinois citizen by dint of 28 U.S.C. § 1348, which states that "All national banking associations shall ... be deemed citizens of the States in which they are respectively located."

the district court's original jurisdiction. *See United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)). For reasons we explain below, however, count I—even if it were a Miller Act claim—would not suffice to establish removal jurisdiction.

The Miller Act provides that suits under the Act "*shall be brought ... in the United States District Court* for any district in which the contract was to be performed and executed *and not elsewhere....*" 40 U.S.C. § 270b(b) (emphasis added). Federal courts unanimously have read this language as establishing that jurisdiction of Miller Act claims is *exclusively* federal. *See, e.g., United States Fidelity & Guaranty Co. v. Hendry Corp.,* 391 F.2d 13 (5th Cir.), *cert. denied,* 393 U.S. 978, 89 S.Ct. 446, 21 L.Ed.2d 439 (1968); *Koppers Co. v. Continental Casualty Co.,* 337 F.2d 499 (8th Cir.1964)(Blackmun, J.); *Blanchard v. Terry & Wright, Inc.,* 331 F.2d 467 (6th Cir.) *cert. denied,* 379 U.S. 831, 85 S.Ct. 62, 13 L.Ed.2d 40 (1964); *United States ex rel. Brandt Electric Co. v. Aetna Casualty & Surety Co.,* 297 F.2d 665 (2d Cir.1962). Until very recently, cases within exclusive federal jurisdiction could not be removed from state court; since removal is a derivative jurisdiction, the theory went, a district court could not acquire jurisdiction via removal of a case that was never properly before the state court. *See Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.,* 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922); *Illinois v. Kerr-McGee Chemical Corp.,* 677 F.2d 571 (7th Cir.), *cert. denied,* 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982); *Koppers, supra.* Congress recently abrogated this rule by amendment of the removal statute, but the amendment applies only to cases filed in state court after June 19, 1986. *See* Pub.L. 99-336, § 3(a), 100 Stat.

637 (codified at 28 U.S.C. § 1441(e)).[3] This case was filed years earlier. Even viewing count I as a Miller Act claim, therefore, the removal was improper.

[1] In its supplemental briefs, Brandt maintains that count I is premised not on the Miller Act, but on state law. Supp. Br. of Plaintiff-Appellee at 4-6. Characterizing count I as a state law claim resolves the derivative jurisdiction dilemma, but it leaves us with neither diversity nor a federal question. A dispute between non-diverse parties involving only state law claims is not, absent some special statutory authority, removable to federal court.

Brandt's alternative argument, based on the doctrine of *Grubbs Tire & Appliance v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612, (1972), is somewhat closer to the mark. In *Grubbs*, the Court reaffirmed a longstanding rule that district court judgments entered after an improper removal may be upheld in cases where the district court *would have had* original jurisdiction of the case as it stood at the time of trial or judgment. 405 U.S. at 702-04, 92 S.Ct. at 1347-48; *see American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951); *Mackay v. Uinta Development Co.*, 229 U.S. 173, 33 S.Ct. 638, 57 L.Ed. 1138 (1913); *Baggs v. Martin*, 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155 (1900). *Grubbs* tends to mitigate the harshness of adhering strictly to the peculiarities of removal doctrine without—and the qualification that follows

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[3] The statute now states that "The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." 28 U.S.C. § 1441(e). The non-retroactivity of the amendment was established in § 3(b) of Pub. L. 99-336, which provided that "The amendment made by this section shall apply with respect to claims in civil actions commenced in State courts on or after the date of the enactment of this section [June 19, 1986]."

is essential—permitting removal outside the limits of original jurisdiction. *See Finn,* 341 U.S. at 17-18, 71 S.Ct. at 541-42.

[2] If count I still formed a part of Brandt's case at the time of trial or judgment, and if it were based on federal law, *Grubbs* might enable us to preserve the judgment despite the improper removal. But each of the foregoing premises is erroneous First, at the time of trial and judgment only count II, based exclusively on state law, remained in the case. Had the case been filed in this posture, the district court would have lacked original jurisdiction, for neither diversity nor a federal question was present; *Grubbs* is therefore inapplicable. *See Finn,* 341 U.S. at 17-18, 71 S.Ct. at 541-542. Second, having examined Brandt's complaint, we believe that count I also was not based on the Miller Act or any other provision of federal law. Though count I mentions the Miller Act (as does count II), it does so only in passing; it neither purports to arise under the Act nor does it necessarily do so in fact.[4] *Cf. Oglesby v. RCA Corp.,* 752 F.2d 272 (7th Cir.1985). The district court, while assuming that jurisdiction was present, expressed skepticism about the federal nature of count I, *see supra* note 1, and even Brandt now concedes that count I was premised solely on state law. We therefore conclude that neither count of Brandt's complaint arose under federal law; that removal was improper; and that the *Grubbs* doctrine is not available to preserve the judgment.

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[4] Count I appears to be based on a common law theory of misapplication of funds. *See* Restatement (Second) of Contracts § 260 (1979). In any event, it is not based on the Miller Act. The Miller Act requires contractors working on federal construction projects to post performance and payment bonds for the protection of the United States and persons furnishing labor or material. 40 U.S.C. § 270a. While subcontractors and suppliers who are not paid for their work may sue in the name of the United States for the amount secured by the payment bond, 40 U.S.C. § 270b, the Act does not provide a remedy for general contractors, like Brandt, who suffer liability under the bond due to the actions of third parties.

[3] Brandt raises one final argument. It maintains that the district court, which already had jurisdiction over Owens-Cornings' action against Brandt, could take ancillary jurisdiction of this case by consolidating the two under Rule 42(a) of the Federal Rules of Civil Procedure. That rule empowers a district court to order the consolidation of "actions involving a common question of law or fact" that are "pending before the court." We agree that *Owens-Corning* was properly before the court under the Miller Act: as a supplier working on a federal construction project, Owens-Corning was entitled to sue the general contractor, Brandt, for DeVolder's default. *See* 40 U.S.C. § 270(a) (persons furnishing labor or material may sue for amount secured by payment bond). We also assume *arguendo* that this case and *Owens-Corning* involve a "common question of law or fact" within the meaning of the rule. But Rule 42(a) requires that *both* actions be "pending before the court" and an improperly removed action does not meet this criterion. *McKenzie v. United States,* 678 F.2d 571, 574 (5th Cir.1982); *Appalachian Power Co. v. Region Properties, Inc.,* 364 F.Supp. 1273, 1277 (W.D.Va. 1973). The district court therefore did not acquire jurisdiction over the improperly removed *Brandt* case by consolidating it with the related and properly filed *Owens-Corning* case.

III.

We do not lightly undertake to vacate a judgment obtained after a full trial on liability and two trials on damages in the district court. After a full examination of the record and the applicable law, however, we are reluctantly persuaded that the district court lacked subject matter jurisdiction. In such circumstances, we have no choice but to vacate the judgment. As the Court in *Finn* stated, "To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judg-

ment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *Finn,* 341 U.S. at 18, 71 S.Ct. at 542.

The judgment is vacated and the case remanded to the district court with directions to remand the case to the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, County Division. *See id.* at 18-19, 71 S.Ct. at 542-543; *In Re Carter,* 618 F.2d 1093, 1098 (5th Cir.1980), *cert. denied,* 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981).

VACATED AND REMANDED WITH DIRECTIONS.

The United States of America for the Use of
Owens-Corning Fiberglas Corporation, a corporation,
Plaintiff,

v.

Brandt Construction Company, a partnership, et al.,
Defendants.

Charles Brandt, et al.,
Plaintiffs,

v.

Uptown National Bank of Moline, a national
banking corporation,
Defendant.

Nos. 83-4066, 84-4073

United States District Court,
C.D. Illinois,
Peoria Division.

Oct. 23, 1984.

General contractor whose final payment to subcontractor was diverted by assignee bank to satisfy unrelated indebtedness of subcontractor rather than used to pay subcontractor's supplier brought action against bank to recover amount it paid on its payment bond to satisfy supplier's claim under the Miller Act. On the parties' motions for summary judgment, the District Court, Mihm, J., held that general contractor could not recover against bank under remedies of subrogation or indemnification.

Plaintiff's motion denied; defendant's motion granted.

Robert J. Noe, Bozeman, Neighbour, Patton & Noe, Moline, Ill., for plaintiff.

Thomas A. Skorepa, Marquis, Bonnett & Skorepa, Rock Island, Ill., for defendants.

ORDER

MIHM, District Judge.

This case was previously consolidated with an action brought by the United States for the use of Owens-Corning Fiberglas Corp. against Brandt Construction Company ("Brandt"). In that consolidated action, the Court granted Plaintiff's motion for summary judgment and entered judgment in favor of Owens-Corning. Plaintiff Brandt Construction Company now seeks to obtain from Defendant Uptown National Bank ("Uptown" or "the Bank") the amount it paid Owens-Corning in satisfaction of the prior judgment.

In Count I of the complaint, brought pursuant to the Miller Act, 40 U.S.C. § 270a et seq., Brandt alleges that the Defendant has violated the duty of a creditor to apply funds from a government bonded job to obligations incurred in generating those funds. Count II alleges misrepresentation and breach of fiduciary relationship. After oral argument, Defendant's motion for summary judgment as to Count II was denied based on the Court's finding that genuine issues of material fact exist. Both parties seek summary judgment with respect to Count I.

FACTUAL BACKGROUND

In October of 1981, Brandt, as general contractor, entered into two subcontracts with DeVolder Brothers Roofing Contractors, Inc. ("DeVolder") pertaining to the repair of two buildings at the Rock Island Arsenal. Pursuant to these contracts and in compliance with the Miller Act, Brandt executed payment and performance bonds on which it was the principal. DeVolder did not have sufficient funds to pay its suppliers and others and needed to obtain capital from a third party. DeVolder went to Uptown National Bank, to which it was already indebted on other obligations. The Bank and DeVolder worked out an agreement whereby the Bank would finance DeVolder on the Arsenal project and DeVolder would

thereafter apply the profit from that job on its previously existing indebtedness to the Bank. DeVolder represented to the Bank that the profit would be approximately $60,000 and that it would come in the form of a retainage fee paid at the time the job was finished.

In April of 1982, representatives of the Bank, Brandt and DeVolder met. Brandt at that time was made aware of the Uptown-DeVolder agreement. The parties discussed how Uptown was to be repaid its monthly advances to DeVolder and worked out an agreement whereby Brandt made checks payable jointly to DeVolder and Uptown.

On October 28, 1982 Brandt made its final payment to DeVolder by a check in the amount of $64,734.56, payable jointly to DeVolder and Uptown. At the time that payment was made, Brandt was unaware that certain firms which had supplied material for the Arsenal project had not been paid, including Owens-Corning. The final payment was in an amount sufficient to pay the balance due all firms supplying material. DeVolder advised Uptown that it was necessary to use the final payment from Brandt to satisfy its obligation to the suppliers and requested that the Bank not take the check as previously agreed. Uptown refused to comply with DeVolder's request and applied the sums to DeVolder's pre-existing indebtedness. DeVolder was thus unable to pay Owens-Corning. DeVolder subsequently filed bankruptcy. Owens-Corning filed a claim against Brandt and the surety on its bond, pursuant to the terms of the Miller Act, and this Court subsequently entered judgment against Brandt. Brandt paid Owens-Corning $59,853.62 in satisfaction of the judgment.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

Although this is not a Miller Act proceeding, Brandt suggests it is a case seeking recovery of the amount paid to a successful Miller Act claimant and it arises because of Uptown's deliberate misappropriation of funds. Brandt argues that despite the

Bank's knowledge that the funds in question were derived from a bonded government project and that certain suppliers were unpaid, Uptown appropriated the funds and applied the payment on the note of DeVolder, an indebtedness totally unrelated to the government project. Brandt contends that the Bank thus violated the rule that a creditor who knows that funds are derived from a government bonded job is obligated to apply the funds to obligations incurred in generating those funds as opposed to an unrelated transaction. See *United States for the Use of C.H. Benton, Inc. v. Roelof Construction Co.*, 418 F.2d 1328 (9th Cir.1969); *United States for the Use of Hyland Electrical Supply Co. v. Franchi Brothers Construction Corp.*, 378 F.2d 134 (2nd Cir.1967).

Uptown argues that the traditional remedies available to a surety or general contractor who has been exposed to liability under its payment bond are subrogation and indemnification. Under either of these theories of recovery, Defendant contends that Brandt has a cause of action against the subcontractor DeVolder but that there is no basis in law for Brandt to in effect waive any rights it has against DeVolder and instead plead a cause of action against the Defendant.

The rule has been established that "once it has been determined that a supplier has knowingly misapplied funds, the misapplied funds must be reallocated to the proper accounts (citations omitted)." *United States for the Use of General Electric Supply Co. v. Wiring, Inc.*, 646 F.2d 1037, 1040 (5th Cir.1981).

> "The rationale for this rule is that it would be unfair to the principal and surety on the Miller Act bond to permit a supplier to collect old debts out of monies paid on a current government project, secure in the knowledge that he will be able to collect for the material furnished on the government project by filing a claim against the bond." 646 F.2d at 1040.

This rule and the rationale behind it do not provide support for the argument advanced by Brandt in this case.

[1] A bank or financial institution which advances money for a government project has no Miller Act protection. The injection of capital into a government project does not constitute the furnishing of labor or materials, and therefore such a creditor has no cause of action against the general contractor's bond. See *First National of Dothan v. American Surety Co. of New York,* 53 F.2d 746 (5th Cir.1931); *U.S. for the Use of First Continental National Bank & Trust Co. v. Western Contracting Corp.,* 341 F.2d 383 (8th Cir.1965).

Roelof, supra, and *Franchi Brothers, supra,* involve factual situations in which a materialman or supplier applied money from a government job to a prior delinquent account and then attempted to assert a Miller Act proceeding on the general contractor's bond. These cases do not establish that any *creditor* who knows that funds are derived from a bonded job is obligated to apply the amount to that account as opposed to an unrelated obligation. See *American Fidelity Co. v. National City Bank of Evansville,* 266 F.2d 910 (D.C.Cir.1959) (where contractor borrowed money from bank and as security therefor legally assigned proceeds of government construction to the bank, in the absence of fraud, sureties on the contractor's performance and payment bonds could not recover progress payments from bank to reimburse them for sums paid by them because of contractor's default after bank had collected progress payments), *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.,* 149 F.2d 73 (5th Cir.1945).

[2] Contrary to Brandt's suggestion, the status of the recipient of the funds is an important consideration. The restrictions in the Miller Act exist not only to protect a general contractor from making double payments, but also to ensure that obligations owing to suppliers and materialmen arising from government projects are satisfied. Further, policy considera-

tions militate against acceptance of Brandt's position. Uptown entered into a contract with the subcontractor DeVolder and obtained assignment of the monies due to DeVolder from Brandt. Under Brandt's logic, once Brandt found out about the diversion of funds by its subcontractor, it could recoup these funds from Uptown and use the money to pay suppliers. If financial institutions do not receive the benefit of their contractual agreements when financing public works, however, they may be dissuaded from becoming involved in public works projects.

[3] Brandt is not entitled to recover against Uptown under the remedies of subrogation or indemnification. Under the principles of subrogation, once Brandt pays the claim of the supplier, Brandt stands in the shoes of that supplier and can gain no better position than the supplier had. There is no allegation that any materialman had an action against Uptown as well as against DeVolder. If it is assumed that Uptown breached some portion of its contract with DeVolder concerning the application of the retainage, Brandt has no right to assert a breach on behalf of DeVolder. There is neither privity of contract nor is there any specific subrogation right contained in the Brandt-DeVolder subcontract which would allow Brandt to assert against Uptown any defenses which DeVolder may have against the Bank. Additionally, there exists in section 8 of the Brandt-DeVolder subcontracts an indemnity agreement by which DeVolder promises to pay for all material furnished under the subcontract and to indemnify Brandt and hold him harmless from any and all claims by those other than the subcontractor. There is no such indemnity agreement between Brandt and Uptown.

Accordingly, Plaintiff's Motion for Summary Judgment is DENIED. Defendant's Motion for Summary Judgment is GRANTED as to Count I.

DOCKET ORDER

(Nov. 2)

Parties present by/c for Telephone Conference call on all pending Motions. Same held. Argument by/c re: MO to Dismiss & MO to Consolidate. ORDERED that MO to Dismiss GRANTED in part and Pltf. (Brandt) has 14 days to file Amended Complaint MO to Consolidate GRANTED. (Mihm, J.)

United States District Court
Central District of Illinois

JUDGMENT IN A CIVIL CASE

Case Number: 83-4073

Charles Brandt and Henry Brandt d/b/a
Brandt Construction Company

v.

Uptown National Bank of Moline,
a National Banking Corp.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the jury verdict rendered September 6, 1985 that as to plaintiff's breach of fiduciary relationship claim, we the jury find for the plaintiff and against the defendant; as to plaintiff's promissory estoppel claim, we the jury find for the plaintiff and against the defendant; as to claims for actual damages, we the jury find for the plaintiff and against the defendant and fix the amount of actual

damages in the sum of $59,883.00; as to claims for punitive damages, we the jury find for the plaintiff and against the defendant and fix the amount of punitive damages in the sum of $158,000.00.—

/s/ John M. Waters
Clerk

/s/ Holly Loudenburg
(By) Deputy Clerk

September 10, 1985
Date

United States District Court
Central District of Illinois

No. 83-4073

Charles Brandt, et al,
Plaintiff,

v.

Uptown National Bank of Moline,
Defendant.

ORDER

(Filed Sept. 24, 1985)

The Plaintiff, Charles Brandt, filed a motion to add interest to the amount of the jury verdict pertaining to actual damages in this case on September 11, 1985. The Defendant, Uptown National Bank of Moline, has indicated that it does not oppose this motion. Therefore, the Court orders that Plaintiff Brandt's motion to add interest to the jury verdict is GRANTED.

It is so ordered this 24th day of September, 1985.

/s/ Michael M. Mihm
United States District Judge

United States District Court
Central District of Illinois

No. 83-4066
c/w 83-4073

The United States of America for the Use of
Owens-Corning Fiberglass Corporation, a corporation,
Plaintiff,

v.

Brandt Construction Company, a partnership, et al.,
Defendants.

and

Charles Brandt, et al.,
Plaintiffs,

v.

Uptown National Bank of Moline, a national banking corporation,
Defendant.

ORDER

(Filed Nov. 26, 1985)

This case is before the Court on the Defendant's, Uptown National Bank of Moline, post-trial motions. After hearing oral argument on the motions and carefully considering the pleadings and the record, the Court orders that the Defendant's motion for judgment n.o.v. or, in the alternative, to grant a new trial, is DENIED. The Defendant's other post-trial motions are also DENIED, except with regard to the motion for reduction of punitive damages.

On the issue of puntive damages, the Court decides that the evidence presented at trial did present a jury question as to whether punitive damages should be ordered and, if so, the amount of those punitive damages. The Court has considered the amount of punitive damages awarded by the jury in light of the evidence presented at trial and concludes that the punitive damage award does meet the standard of "clearly excessive."

In considering the nature of the Defendant's conduct for the purposes of awarding punitive damages, the trier of fact must focus its analysis on the nature of the wrong between the parties to the action. In the present case, the jury found that the Defendant had breached a fiduciary duty to the Plaintiff. However, in determining the amount of punitive damages to award, it appears to this Court that the jury incorrectly focused its decision-

making on the result of that wrong to DeVolder, a person who was not one of the parties to the action, rather than on the Plaintiff Brandt.

Therefore, the Court orders a remittitur on the amount of punitive damages, reducing the punitive damage award from $158,000 to $25,000. In arriving at the amount of $25,000, the Court notes that this is not an insignificant amount of money to be awarded, and it is only slightly less than one-half of the amount of the compensatory damages which were recovered by the Plaintiff.

The Plaintiff must decide whether to accept this remittitur. If the Plaintiff does accept this reduction, then the decisions of this Court become a final judgment for purposes of appeal. If the Plaintiff decides not to accept this remittitur, then the Court will set up a schedule for a new trial on the issue of punitive damages. The Plaintiff has 21 days to decide whether to accept the remittitur or exercise his right to a new trial, and until the punitive damages issue is settled, there is no final judgment in this case for purposes of appeal.

It is so ordered this 26th day of November, 1985.

/s/ Michael M. Mihm
United States District Judge

JUDGMENT IN A CIVIL CASE

United States District Court
Central District of Illinois

Docket Number
83-4073

Judge Michael M. Mihm
Judge

Charles Brandt and Henry Brandt d/b/a
Brandt Construction Co., a partnership

v.

Uptown National Bank of Moline, A
National Banking Corporation

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Plaintiff and against Defendant and assess punitive damages in the sum of $125,000.00—

/s/ John M. Waters
Clerk

/s/ Holly Williams
(By) Deputy Clerk

Date: 4/29/86

United States District Court
Central District of Illinois

No. 83-4066
consolidated with No. 84-4073

The United States of America for the
use of Owens-Corning Fiberglas Corporation,
Plaintiff,

v.

Brandt Construction Company,
a partnership, et al.,
Defendants,

and

Charles Brandt, et al,
Plaintiffs,

v.

Uptown National Bank of Moline,
a national banking corporation,
Defendant.

ORDER

(Filed June 2, 1986)

The Court has considered the issues raised by the Defendant, Uptown National Bank of Moline, in its post trial motion following the jury trial on punitive damages in April, 1986. In conjunction with this post trial motion, the Court has also considered the post trial motion which the Defendant Uptown filed following the first trial on liability and damages in 1985. The Court orders that the motion to enter judgment n.o.v. or, in the alternative, to grant a new trial, is DENIED, and also DENIES the Defendant's motion for a remittitur as to the amount of punitive damages.

It is so ordered this 2nd day of June, 1986.

/s/ Michael M. Mihm
United States District Judge

APPENDIX B

United States District Court
Central District of Illinois
Rock Island Division

No. 83 4073

Charles Brandt and Henry Brandt, d/b/a
Brandt Construction Co., a partnership,
Plaintiffs,

vs.

Uptown National Bank of Moline, a National
Banking Corporation,
Defendant.

MEMORANDUM IN RESISTANCE TO DEFENDANT'S MOTION TO DISMISS AND/OR STRIKE

Both counts of the Complaint state a cause of action, accordingly the Motion to Dismiss and/or Strike filed by the defendant should be denied and the defendant ordered to answer.

The motion seeks to require that a collection action under the Miller Act (40 USC §270a et seq.) be grafted into this suit. In fact, such an action is a related, but separate proceeding, involving different parties and issues. If the court grants the pending Motion to Invoke Ancillary Jurisdiction and to Consolidate such issues can be resolved in this proceeding and many of the points raised in the defendant's motion obviated.

COUNT I

The plaintiff is proceeding in Count I on a theory that a party who knows or has reason to believe that funds paid to it were received from a particular bonded project has a duty to apply those funds to obligations arising from that job.

In *United States for the Use of C. H. Benton, Inc., v. Roelof Construction Co.*, 418 F.2d 1328 (9th Cir. 1969), a paint supplier was denied recovery under the Miller Act upon the finding that it was aware that certain payments which it received from its customer were derived from the bonded job yet applied them to indebtedness arising from non-bonded matters. The court stated:

> The law is well settled that if a creditor knows or has reason to believe that money paid him is received from a particular bonded job, he has the duty to apply the funds so received from the debtor upon that account. 418 F.2d at 1330.

Even closer to the present situation is *United States for the Use of Hyland Electrical Supply Co. v. Franchi Bros. Construction Corp.*, 378 F.2d 134 (2nd Cir. 1967), a case involving joint checks.

In *Franchi,* the general contractor contracted with Fairway Electric pertaining to a government project. Fairway purchased material from Hyland. Franchi, the general contractor, paid via checks issued jointly to Fairway and Hyland. Hyland applied a portion of these payments to Fairway's account pertaining to the bonded work but allocated other of these funds to other portions of Fairway's account. When Fairway filed bankruptcy a question developed as to the extent of Hyland's claim against the bond. The court held (even though the general contractor was advised as to the allocation) that Hyland had an equitable duty to apply all funds which it received with knowledge that they were derived from the government job to that bonded account.

Thus the following allegations of Count I — all of which must be taken as true for purposes of the motion — set forth a basis for recovery of any sums which Brandt Construction Company (principal under the bond) has to pay by virtue of the Miller Act, to-wit:

Brandt entered into a government contract upon which DeVolder Brothers Roofing Contractors, Inc. was one of its subcontractors. Certain material was purchased by DeVolder from Owens-Corning and W. G. Block Company and on October 28, 1982, Brandt made a final payment to DeVolder in an amount sufficient to pay the balance due each of these suppliers. This check was made payable to DeVolder and Uptown National Bank of Moline, pursuant to previous request of the defendant. Uptown, with knowledge that the funds were derived from a particular government project applied the funds on an unrelated debt of DeVolder. Since no additional funds were due on the bonded project, notices of claims being asserted under the Miller Act were received from Owens-Corning and Block. Suit seeking collection has been filed by Owens-Corning (83-4066). Equity requires that Uptown reimburse Brandt for losses stemming from its misallocation of the funds.

Specifically addressing the defendant's motion, subparagraphs A, B. D, E, F and G of Paragraph 1 are matters which are appropriate to the collection action (83-4066), subparagraphs C and H are necessary allegations to establish liability under the doctrine announced in *Roelof* and *Franchi* and subparagraph I should be denied because this suit is not brought under the Miller Act but is a derivative action.

COUNT II

Under Illinois law, recovery can be predicated upon either proof of fraud or abuse of a fiduciary relationship. *Ray v. Winter,* 67 Ill.2d 296, 367 N.E.2d 678, 10 Ill.Dec. 225 (1977); *Badger Building Corp. v. Gregoric,* 102 Ill.App.3d 594, 430 N.E. 2d 561, 58 Ill.Dec. 529 (1981). This is often termed imposition of a constructive trust as to funds improperly obtained.

For this reason a specific allegation of fraud is not required and the allegation of the existence of a fiduciary relationship between the parties in paragraph 4 (read in conjunction with the

facts alleged elsewhere in Count II) is proper. Accordingly subparagraphs D and E of paragraph 2 of the motion should be denied.

Subparagraphs A, B and C of paragraph 2 should be denied for the reasons stated in the discussion of Count I.

Respectfully submitted,

CHARLES BRANDT and
HENRY BRANDT, d/b/a
BRANDT CONSTRUCTION CO.,
a partnership,

/s/ Robert J. Noe
For: Bozeman, Neighbour, Patton & Noe
Their Attorneys

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United States District Court
For The Central District of Illinois

No. 83-4073

Charles Brandt and Henry Brandt, d/b/a
Brandt Construction Co., a Partnership,
Plaintiffs,

vs.

Uptown National Bank of Moline,
a National Banking Corporation,
Defendant.

MOTION TO INVOKE ANCILLARY JURISDICTION AND TO CONSOLIDATE

NOW COME Charles Brandt and Henry Brandt, d/b/a Brandt Construction Co., a partnership, by Bozeman, Neighbour, Patton & Noe, their attorneys, and move the court to take ancillary jurisdiction of the matters herein and to consolidate this cause with Cause No. 83-4066 pending in this court and in support of said motion state:

1. The issues herein relate to and grow out of those to be adjudicated in The United States of America for the Use of Owens-Corning Fiberglass Corporation v. Brandt Construction Company, et al, currently pending in this court as Cause No. 83-4066.

2. This court has inherent power to do all things necessary for the administration of justice and thus the issues herein, being ancillary or incidental to or growing out of the matters at issue in Cause No. 83-4066 may be taken cognizance of and determined by this court in aid of its authority over the matters referred to in Cause No. 83-4073.

3. A Memorandum in Support of this motion is attached hereto as Exhibit A.

CHARLES BRANDT and
HENRY BRANDT, d/b/a
BRANDT CONSTRUCTION CO.,
a Partnership, Defendants,

By /s/ Robert J. Noe
For: Bozeman, Neighbour, Patton &
Noe
Their Attorneys

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EXHIBIT A

United States District Court
For the Central District of Illinois

No. 83-4073

Charles Brandt and Henry Brandt, d/b/a
Brandt Construction Co., a partnership,
Plaintiffs,

vs.

Uptown National Bank of Moline,
a National Banking Corporation,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO INVOKE ANCILLARY JURISDICTION AND TO CONSOLIDATE

The following Memorandum is submitted in support of the Motion to Invoke Ancillary Jurisdiction and to Consolidate filed by the plaintiffs herein:

Courts have the inherent power to invoke ancillary jurisdiction so as to be able to take actions which are incidental to the exercise of its primary jurisdiction. *Garzot v. Rios de Rubio,* 209 U.S. 283, 28 S.Ct. 548 (1908); *Morrow v. District of Columbia,* 417 F.2d 728 (1969).

In *Morrow* the court noted that "all courts, absent some specific power, possess ancillary powers to effectuate their jurisdiction:

> " * * * (E)very regularly constituted court has power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, and for the enforcement of its judgments and mandates.
>
> So demands, matters, or questions ancillary or incidental to, or growing out of, the main action * * may be taken

> cognizance of by the court and determined, since such jurisdiction is in aid of its authority over the principal matter, even though the court may thus be called on to consider and decide matters which, as original causes of action, would not be within its cognizance. * * * " *Supra* at 737-738.

The court went on to term ancillary jurisdiction "a common sense solution" to the problems, especially courts of limited jurisdiction such of the federal district courts, face in attempting to "do complete justice in the premises." *Supra* at 738.

It would be beneficial for the parties and the judicial system if the entire matter could be resolved in one forum rather than requiring piecemeal determination in different courts. Thus the Motion should be allowed and the consolidated cause be resolved in this court.

Respectfully submitted,

CHARLES BRANDT and
HENRY BRANDT, d/b/a
BRANDT CONSTRUCTION CO.,
a Partnership, Defendants,

By /s/ Robert J. Noe
For: Bozeman, Neighbour, Patton &
Noe
Their Attorneys

Robert J. Noe, Of Counsel
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APPENDIX C

U.S.C. § 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000. . . .

U.S.C. § 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections

270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The united States shall not be liable for the payment of any costs or expenses of any such suit.

U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Fed. R. Civ. P. Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Fed. R. Civ. P. Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his origninal answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the

plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-part plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so. . . .

Fed. R. Civ. P. Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.